Exhibit 21

GT GreenbergTraurig

David G. Barger
Tel 703.749.1307
Fax 703.714.8307
[redacted]@gtlaw.com

December 7, 2018

BY EMAIL

Office of Privacy and Civil Liberties
National Place Building
Suite 1000
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

privacy@usdoj.gov

Re: Administrative Appeal in requests: EOUSA-2018-004905 and OPR FOIA No. F18-00140

Appellate coordinator:

My name is David Barger and my firm and I represent Ashley Neese in a matter currently pending with the Office of Professional Responsibility, Department of Justice. It is my understanding that the Office of Privacy and Civil Liberties ensures compliance with the Privacy Act of 1974. Please note that we are also submitting a similar letter to the Office of Information Policy, which serves as the office that ensures other Department of Justice components comply with the FOIA statute.

On July 20, 2018, we submitted Privacy Act and FOIA requests pertaining to Ms. Neese, who was a federal employee with the Department of Justice from October 2008 until June 29, 2018. The purpose of this letter is to file administrative appeals for OPR FOIA No. F18-00140 and EOUSA-2018-004905 in accordance with information provided on the Department of Justice's website and in compliance with 28 C.F.R. § 16.45.

Background Information

On May 3, 2018, Ms. Neese and I were separately verbally informed in general terms by her then-employer, the U.S. Attorney for the Western District of Virginia, , of vague allegations that had been made against her by an individual named [redacted] through attorneys, Paul Beers and Emma Kozlowski. We were briefly informed that amongst the allegations, the USAO had received purported text messages and email communications, and they had been made aware that [redacted] had provided a statement, presumably taken by Mr. Beers or Ms. Kozlowski, that was transcribed and provided to the USAO.

EXHIBIT 21

Neither Ms. Neese nor I were provided with any written notice outlining the proposed actions the USAO took against her, the specific reasons for the proposed actions, a reasonable time for her to respond to the proposed actions and to provide any supporting evidence on her behalf from the USAO, or any other component within DOJ.[1] Rather, Ms. Neese had her work cellular telephone taken from her by members of the USAO-WDVA. She was escorted to her office to get her purse by two members of management, and then, she was escorted back to the Main Conference Room of the USAO, where the United States Attorney contacted me. Ms. Neese was then escorted to the elevators and informed to leave the USAO work space, and not to come back until otherwise notified. Other actions were taken against her, including but not limited to, her PIV card was taken and disabled, her fob was disabled, she was not allowed to have access to the USAO space or able to obtain her personal belongings, etc. On May 3, 2018, Ms. Neese was placed on indefinite administrative leave.

During conversation with the USA, he advised me, among other things, that Mr. Beers had stated that [redacted] was a subject of the federal grand jury investigation in Operation Pain Train. I later advised the USA that the information provided by Mr. Beers was incorrect and that Ms. Clark was never a subject or target of a grand jury investigation. Since Mr. Beers represented Les Christopher Burns, a defendant who was previously prosecuted by Ms. Neese, during post-trial litigation, Mr. Beers likely knew that [redacted] was never a target or subject of the investigation, given documents he had been provided during that case and filings he made. After this conversation, within the first week of Ms. Neese being on administrative leave, we were advised that Ms. Neese should return to work, though to the Civil Division, on Monday, May 21, 2018, without explanation or any written notice concerning why she was permitted to return to work or why she was being moved to the Civil Division. When she returned to work, Ms. Neese had very limited access in the USAO, including no access to her former office or her personal belongings. Based on the way she had been treated and how the USAO/DOJ handled matters, Ms. Neese accepted another job opportunity outside of the federal government. Ms. Neese provided notice of her resignation on or about June 11, 2018, with her last date of employment being June 29, 2018.[2] Ms. Neese was allowed to obtain her personal belongings on June 28 and June 29, 2018, almost two months after she was placed on administrative leave.

OPR issued an inquiry letter to Ms. Neese on June 28, 2018, the date before Ms. Neese's last date of employment with DOJ. Originally, OPR wanted a response to numerous questions proposed in its inquiry letter dated June 28, 2018, by July 20, 2018. We made multiple requests to OPR to provide to us discovery pertaining to the questions posed; however, to date, OPR has only provided "certain" purported text messages and email communications pursuant to a strict confidentiality agreement. Moreover, OPR has denied all of our requests made for any additional discovery, even though we have stressed that we should be entitled to due process in the administrative investigation. As we explained to OPR, the material we requested is important and

[1] See 5 U.S.C. § 7503 and 7513, wherein, according to the statutes, federal employees are entitled to certain rights if a federal agency/component intends to propose certain actions including suspending the employee. The procedures set forth in the statute are to be followed.

[2] After OPR learned that Ms. Neese was planning to leave federal employment, it appears OPR hurried the process and issued an inquiry letter to us on June 28, 2018 before her last day of employment.

relevant (See Attachment 1 – List of items requested from OPR on August 16, 2018) to our ability to effectively and meaningfully respond to OPR's questions.

Privacy Act and FOIA Requests

Due to OPR's unwillingness to provide pertinent information to us that we consider relevant and necessary for us to provide an effective written response to OPR, we submitted Privacy Act and FOIA requests to OPR and the USAO/EOUSA.

a. **OPR Privacy Act and FOIA Request No. F18-00140**

On July 20, 2018, we submitted a Privacy Act and FOIA request to Lyn Hardy, Special Counsel for Freedom of Information & Privacy Acts (See Attachment 2). As you can see, the letter lays out numerous requests for information, documents, communications, and other items pertaining to Ms. Neese.

On July 24, 2018, Ms. Hardy provided to us a letter acknowledging receipt of our request, our assigned request number, and asking for Ms. Neese's written authorization to disclose records pertaining to her to me. (See Attachment 3). Ms. Neese completed the form the very next day, and we submitted this completed and signed form to OPR on July 25, 2018. (Attachment 4).

Following that submission, we did not hear from Ms. Hardy again until I reached out to her on September 10, 2018, to request a status update regarding our request. In response, Ms. Hardy sent a letter dated September 10, 2018, (Attachment 5), in which she informed us that our request was deemed to be an "unusual circumstances" request and our request had been placed on the "complex track." She advised us that we could "narrow" our request, to which we chose not to do, as the information we requested is important to us. Further, she provided, "[i]f you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact me or our FOIA Public Liaison, for any further assistance and to discuss any aspect or your request[.]" However, the letter did not provide any guidance on a time frame by which we were to expect any materials being released to us.

Then, on September 11, 2018, we submitted a response letter to Ms. Hardy. (Attachment 6). In that letter, we informed Ms. Hardy that we were aware of records and information that exist and are responsive to our requests. We asked Ms. Hardy to provide to us a date by which we would expect to receive documents. The letter further set forth the time frame by which, in accordance with 5 U.S.C. § 552(a)(6)(A)(i), OPR should have complied with providing materials in response to our request. The letter also informed Ms. Hardy that we did not want to narrow our request and that we were aware of the United States Court of Appeals for the District of Columbia's recent decision in *Bartko v. United States*, dated August 3, 2018. Given that decision, we informed Ms. Hardy that we anticipated receiving the material we requested in our letter dated July 20, 2018.

Following the issuance of that letter to Ms. Hardy on September 11, 2018, I did not hear a response from Ms. Hardy. On September 21, 2018, I resent the email with the letter I had sent to

Ms. Hardy on September 11, 2018. Again, I received no response from Ms. Hardy. On September 30, 2018, I sent another email to Ms. Hardy requesting a response from her. Ms. Hardy finally responded on October 3, 2018. In her response, Ms. Hardy resent her letter dated September 10, 2018, and indicated that OPR had received almost 200 FOIA requests in FY 2018. Ms. Hardy again advised that our request was assigned to the "complex track;" however, Ms. Hardy did not give us a time frame by which we should expect to receive anything from OPR. I responded on the same date in an email to Ms. Hardy. In my response, I advised Ms. Hardy that we had received her letter dated September 10, 2018, and that we had sent her a letter dated September 11, 2018. Again, I asked if she could inform me when we could expect a substantive response, or at least, initial production of materials.

Ms. Hardy did not respond to my email dated October 3, 2018. Thus, I sent her another email on October 16, 2018. In that email, I advised Ms. Hardy that I had never received a response regarding a time by which we should expect to receive disclosure of information from OPR. I further informed her that OPR's lack of providing a date for initial production appeared to be problematic given the statutory mandates.

Ms. Hardy responded to my email on October 17, 2018. Ms. Hardy set forth that OPR had extended the 10-day time frame in which to respond. However, Ms. Hardy did not inform me when I should expect a response. I then responded to Ms. Hardy on October 17, 2018. I informed Ms. Hardy that she had never answered my repeated requests for when we may expect the first round of production. I further advised that some of the information appeared to be quite easy to produce, including the information provided to the government by Mr. Beers. Additionally, I informed Ms. Hardy that OPR's failure to produce documentation within the statutory period, along with its failure to provide to us a "date" upon which we should receive production was a clear statutory violation. Ms. Hardy did not respond to this email.

Since Ms. Hardy did not provide a date to me or any response to my email dated October 17, 2018, I called OPR Liaison, Ginae Barnett, on October 31, 2018, and left her a voicemail. Ms. Barnett has never returned my phone call.

On November 8, 2018, I again emailed Ms. Hardy to request a date by which we would receive production from OPR-FOIA. To date, Ms. Hardy has not responded to my email dated November 8, 2018; she has not provided a date by which we will receive any responsive materials to our request; and, we have not even received one document in response to our request from July 20, 2018.

On November 12, 2018, I followed up on my voicemail which I left for OPR-FOIA Liaison Ms. Barnett on October 31, 2018, with an email to her. To date, I have not received any responsive communication from Ms. Barnett.

Ms. Hardy to date has not supplied a single document nor indicated when we may expect to receive a response. We submit that Ms. Hardy and Ms. Barnett have not complied with the statute as it has been well more than four months since we submitted our Privacy Act/FOIA request

to OPR. As set forth in 5 U.S.C. § 552, typically the responding agency should provide the requestor with information/documentation within 20 working days. Moreover, if the responding agency is contending the request to be an "unusual circumstances" request, that agency is to inform the requestor of "the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph." To date, Ms. Hardy has failed to provide us with any documentation that we know we are entitled to receive, and she has failed to provide us with "the date on which a determination is expected to be dispatched." It has obviously been well more than 30 working days since our request of July 20, 2018. Thus, we are in a situation where OPR-FOIA is not complying with the statute and timely providing us with the records we have requested and are entitled to receive, and neither the Special Counsel nor the OPR Liaison will return my emails or phone calls. I submit that their actions clearly show that they are purposely ignoring our requests for information to which we are entitled under the Privacy Act and/or FOIA. Therefore, I submit this letter as our request to appeal the lack of response by OPR-FOIA, as I cannot make them respond and comply with the statute, apparently, without proceeding with an administrative appeal.

b. EOUSA Privacy Act and FOIA Request No. EOUSA-2018-004905

On July 20, 2018, we also submitted our Privacy Act/FOIA request to the USAO-WDVA. (Attachment 7). That letter contained essentially the same requests for information that the letter to Ms. Hardy, dated July 20, 2018, contained. In response, EOUSA submitted a letter to us on August 3, 2018, acknowledging receipt of our request.

On September 11, 2018, I reached out to EOUSA-FOIA via email because according to FOIAonline.gov, under tracking number EOUSA-2018-004905, we learned that EOUSA's response to our FOIA and Privacy Act request, which was made July 20, 2018, was due on September 10, 2018.[3] We did not receive any response and/or materials on or before September 10, 2018. Thereafter, I learned that Princina Stone was the EOUSA FOIA contact assigned to our request.

I reached out to Ms. Stone on September 14, 2018. Ms. Stone and I engaged in a telephone conversation on that date. During that call, we discussed our request. I informed Ms. Stone that we would accept rolling production of materials because, as she said, there were other components that EOUSA was going to receive materials from. Ms. Stone also advised that she intended to provide the first-round production in a couple of weeks, essentially by the end of September 2018. Further, Ms. Stone had some questions pertaining to whether we could receive some of the requested information without "waivers" by certain individuals.

By the end of September 2018, we did not receive any production of materials from EOUSA. On September 30, 2018, in response to our telephone conversation of September 14, we submitted a letter to Ms. Stone addressing some of those potential issues. (Attachment 8).

[3] In fact, to date, the website still shows a due date of September 10, 2018.

Thereafter, Ms. Stone and I engaged in numerous email communications. On October 29, 2018, Ms. Stone and I engaged in a phone conversation wherein I learned that: 1) EOUSA did not produce documents on October 26, 2018, because the materials had to be reviewed before disclosure; 2) Ms. Stone and EOUSA would be producing the first round production on that date; 3) Ms. Stone had not received much of the information we had directly requested from USAO-WDVA (namely, the information provided to the USAO-WDVA by Paul Beers and Emma Kozlowski, including, but not limited to, the statement made [redacted] and any and all communications between Paul Beers, Emma Kozlowski, and any employee of DOJ); 4) OPR and EOUSA were not coordinating production of materials together but rather, the requests were being treated separately (even though both components advised that they had to consult with and work with other DOJ components in order to respond to our requests); and 5) the USAO-WDVA had only provided materials pertaining to Ms. Neese's personnel file and the discovery from the underlying criminal cases (apparently).

Later on October 29, 2018, I received a letter from EOUSA, along with what I believed to be the first production from EOUSA, based on my communications with Ms. Stone. The letter sets forth that it is the "first interim response" from EOUSA. (Attachment 9). The letter further shows that EOUSA only produced 306 pages in full. EOUSA released 23 pages in part and EOUSA withheld disclosure of 208 pages. EOUSA's letter only advises that those pages were withheld under exemptions (b)(5), (b)(6), and (b)(7),[4] without any further explanation. The letter also states, "[t]his is a final determination as to your request for third party records."[5] It further provides that the appellate period is 90 days (rather than the 60 days listed in the code section). The letter was signed by Kevin Krebs, Assistant Director.

Following our receipt of this first production, I contacted AUSA Jennifer Bockhorst, the individual handling our request at the USAO level. I first called Ms. Bockhorst on October 29, 2018 and left her a voicemail. On October 30, 2018, I then emailed Ms. Bockhorst. In my email to her, I informed her that I was concerned with the length of time it was taking for the USAO-WDVA to provide the requested materials to EOUSA, and further, that the materials were very important and critical to us with the ongoing OPR matter. I also advised Ms. Bockhorst that the failure to produce the requested material was prejudicial to my client.

I did not receive a response from Ms. Bockhorst. Rather, on October 31, 2018, Ms. Stone responded to me and asked that I direct all of my communications regarding our EOUSA-FOIA request to her. Ms. Stone and I exchanged emails (Attachment 10) between October 31, 2018

---

[4] It should be noted that these exemptions, as the letter's attachment shows, are made pursuant to FOIA and not the Privacy Act. This matter is concerning because even as DOJ-OIP's website sets forth, in pertinent part, "If . . . any or all of the requested material is to be denied, it must be considered under the substantive provisions of both acts. The withholding must be justified by the assertion of a legal applicable exemption in each Act. The fact that a record is exempt under one of the two acts is not determinative; if it is not exempt under the other, it must be released to the first [party]."

[5] EOUSA's letter states that our request was a third-party request. We respectfully submit that it was not a third-party request but rather, our request was mainly a first-party request, with certain lesser parts of the request being deemed to be a third-party request.

and November 2, 2018; however, Ms. Stone has not provided a date by which EOUSA expected to produce the next round production.

On November 12, 2018, I sent another email to Ms. Stone, wherein I asked when we should expect another round of production of documents. To date, I have not received any response. The overall failure of EOUSA/USAO and OPR to provide responsive materials to our request, dated July 20, 2018, has led to us to filing this administrative appeal.

On November 26, 2018, I received a letter from the Professional Responsibility Advisory Office ("PRAO"), dated November 15, 2018, which explained that PRAO had not received our July 20, 2018 request until October 31, 2018. (Attachment 11). According to the letter, PRAO advised that it had sixteen (16) pages, which were all withheld pursuant to Exemption 5 of FOIA, without further explanation of what the records concern.[6]

Administrative Appeal: Analysis

The Privacy Act focuses on four basic policy objectives : 1) to restrict disclosure of personally identifiable records maintained by agencies; 2) to grant individuals increased rights of access to agency records maintained on themselves; 3) to grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely, or complete; and 4) to establish a code of "fair information practices" that requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records. In accordance with these basic core objectives, and given that the majority of information we have requested directly concerns, and in many instances directly discusses my client, Ms. Neese, we submit that our requests to OPR-FOIA and EOUSA/USAO fall directly within the parameters of the Privacy Act and FOIA.

Privacy Act rights are personal to the individual who is the subject of the record.. See, e.g., *Warren v. Colvin*, 744 F.3d 841, 843-44 (2d Cir. 2014). A record is described as "any item, collection, or grouping of information about an individual that is maintained by an agency, . . ." 5 U.S.C. § 552a(a)(4). In the Fourth Circuit, the Court has noted that, " the legislative history of the Act makes it clear that a 'record' was meant to 'include as little as one descriptive item about an individual." Williams, Jr. v. Dept. of Vet. Affairs, 104 F.3d 670, 674 (4th Cir. 1997). The Court held that even "draft" materials qualified as "records" because they "substantially pertain to Appellant," "contain 'information about' [him], as well as his 'name' or 'identifying number,'" and "do more than merely apply to him." *Id.*

Thus, for example, the purported text message and email communications, along with the transcript of statements by [redacted] to a court reporter about Ms. Neese, which the United States Attorney advised were voluntarily provided by Roanoke attorney Paul Beers to the USAO WDVA, clearly exist and should be provided. Additionally, any notes of conversations with Mr.

[6] Additionally, PRAO's letter does not make clear whether it analyzed our request under the Privacy Act as well as FOIA. Since our request is a first-party request, if we should be entitled to the documents maintained by PRAO under the Privacy Act, then no FOIA exemption should be applicable.

Beers about these materials and his conversations with any employee of the USAO-WDVA, or any DOJ employee, regarding Ms. Neese, which I understand exist, and which Ms. Neese observed, should also be produced. While the Privacy Act has a "No Disclosure Without Consent" Rule, given that the majority of the information we have requested directly pertains to and discusses Ms. Neese, we submit that the consent rule does not apply to this material. Further, a "disclosure" under the Privacy Act does not occur if the communication is to a person who is already aware of the information. See, e.g., *Quinn v. Stone*, 978 F.2d 126, 134 (3d Cir. 1992); *Kline v. HHS*, 927 F.2d 522, 524 (10th Cir. 1991); *Hollis v. Army*, 856 F.2d 1541, 1545 (D.C. Cir. 1988).

Regarding any alleged "privacy" rights that [redacted] may assert, her rights have been waived, and thus, there is no Privacy Act violation in producing the materials about Ms. Neese that Mr. Beers provided, especially given that Ms. Clark, Mr. Beers, and Ms. Kozlowski, have made an allegation against Ms. Neese. See, e.g., *Hoffman v. Rubin*, 193 F.3d 959, 966 (8th Cir. 1999) (finding no Privacy Act violation where agency disclosed same information in letter to journalist that plaintiff himself had previously provided to journalist; plaintiff "waiv[ed], in effect, his protection under the Privacy Act"). [redacted] Mr. Beers, and Ms. Kozlowski effectively waived any potential privacy rights when they made the allegations about Ms. Neese to the USAO-WDVA, and by disclosing information to any Department of Justice components and employees.

Regarding the investigative material from Operation Pain Train which we have requested, we submit that there would be no violation of the Privacy Act because Ms. Neese is already aware of this information as she was the lead AUSA prosecuting the overall case. She had access to the investigative material throughout the case and those materials were disclosed as part of discovery in the matter.

Further, the Office of Information Policy's website discusses Privacy Act/FOIA requests and sets forth differences in third party requesters and first party requesters. As the website states, "when the Privacy Act was passed, there was disagreement as to whether it had become the exclusive vehicle for persons seeking their own records from a system of records. The answer to this question is an unqualified 'no.' The fact that someone is an 'individual' with rights of access under the Privacy Act does not in any way change the fact that he or she is also a 'person' with rights of access under FOIA.

Thus, although it need not be counted as such for statistical purposes, a Privacy Act request for access to records should normally be considered as, in effect, also a FOIA request. If, however, all or any portion of the requested material is to be denied, it *must* be considered under the substantive provisions of *both acts*. The withholding must be justified by the assertion of a legally applicable exemption in each Act.

The fact that a record is exempt under one of the two acts is not determinative; if it is not exempt under the other, it must be released to a first party. Furthermore, this is the result whether or not the requester cites the Privacy Act only, FOIA only, both acts, or neither act.

In practice, agencies would not reach the FOIA exemption question unless the records were exempt under the Privacy Act because subsection (q) of the Privacy Act provides that no FOIA exemption may be used to deny an individual's Privacy Act rights of access.

In addition to these substantive issues, first party requests present significant procedural interface problems. FOIA requires that initial requests for access be answered in ten working days and administrative appeals in twenty. The Privacy Act contains no such administrative deadlines for responding to access requests. The Office of Management and Budget (the lead agency on Privacy Act matters) has recommended that such requests be acknowledged within ten working days and that '[w]henever practicable, that acknowledgment should indicate whether or not access can be granted, and, if so, when.' 40 Fed. Reg. 28,957 (1975).

Thus, the question arises as to what procedures are to be followed in processing first party requests for records in a Privacy Act system of records. Although technical arguments can be made that the FOIA time limits apply, OIP believes the substantive complexities of dual processing justify following Privacy Act procedures, including any time limits an agency has imposed on itself by regulation. *See, e.g.*, 28 C.F.R. §§ 16.45 (initial requests) and 16.57 (appeals). We recommend, however, that because of the technical arguments mentioned above, agencies process these first-party requests in accordance with the FOIA time limits whenever possible."

Herein, we are a first-party requester, given the information we have requested mainly pertains to Ms. Neese, a DOJ employee from October 2008 until June 29, 2018. We are positive certain "records" exist, and we are highly confident that we are entitled to that information pursuant to the Privacy Act and pursuant to FOIA. Moreover, OPR-FOIA and EOUSA/USAO-WDVA have clearly failed to comply with the recommendation regarding the time limits set forth by the Office of Information Policy, which is essentially the same time limits as called for under FOIA.

Thus, we have made numerous efforts to get OPR-FOIA and EOUSA/USAO-WDVA to comply with the Privacy Act and FOIA by providing responsive materials to our requests dated July 20, 2018, to limited avail (one production by EOUSA). Interestingly enough, neither OPR-FOIA nor EOUSA/USAO-WDVA have produced to us the relevant materials, which we requested in order in our letter dated July 20, 2018, that we know exist and materials to which we are clearly entitled to receive under the Privacy Act, given that we are first party requesters and the information pertains to my client, Ms. Neese. It has been more than four months since our requests were made and it seems there is a coordinated effort to withhold/ignore and/or blatantly disregard our requests made pursuant to the Privacy Act and FOIA.

Conclusion

We submit this letter, and the attached information, as a written administrative appeal in order to compel the production of the responsive information

Thank you for your time and attention to this matter.

Sincerely,

David G. Barger